

III - 00-14-2c  
(03-06-0547)

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

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7/14/03

UNITED STATES OF AMERICA AND STATE )  
OF DELAWARE, DEPARTMENT OF NATURAL )  
RESOURCES AND ENVIRONMENTAL )  
CONTROL )

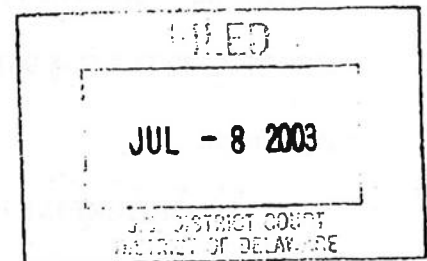
Plaintiffs,

v.

THE KREWATCH PARTNERSHIP,  
ANTONIO V. NERO,  
GARDNER ASPHALT CORPORATION,  
EMULSION PRODUCTS COMPANY, and  
RAYMOND T. HYER, JR.,

Defendants.

Civil Action No. 01-659-GMS  
Civil Action No. 01-660-GMS  
(Consolidated)



**ORDER APPROVING SETTLEMENT AGREEMENT BETWEEN  
UNITED STATES OF AMERICA AND GARDNER ASPHALT CORPORATION,  
EMULSION PRODUCTS COMPANY, AND RAYMOND T. HYER, JR.**

THIS CASE came on for consideration on the Stipulation and Agreement (the "Settlement Agreement") by and between Plaintiff the UNITED STATES OF AMERICA ("United States") and Defendants GARDNER ASPHALT CORPORATION, EMULSION PRODUCTS COMPANY, and RAYMOND T. HYER, JR. (collectively, the "Settling Defendants"). The Court having considered the record, it is accordingly

ORDERED that the Settlement Agreement be, and the same is, hereby APPROVED. The Court finds and concludes that the Settlement Agreement is fair, reasonable, and in the public interest. It is further

ORDERED that the Court reserves jurisdiction over the parties to the Settlement Agreement to enforce the terms thereof, including, without limitation, the provisions for

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Civil Action No. 01-660 GMS

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DISTRICT OF DELAWARE  
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**STIPULATION AND AGREEMENT BETWEEN THE UNITED STATES OF  
AMERICA AND GARDNER ASPHALT CORPORATION,  
EMULSION PRODUCTS COMPANY, AND RAYMOND T. HYER, JR.**

## **I. BACKGROUND**

A. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint in this matter pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607, as amended ("CERCLA"), seeking reimbursement of response costs incurred by the United States for response actions taken or to be taken at or in connection with the release or threatened release of hazardous substances at the Drum Burial Area of the Krewatch Farm Site, located at Tharp Road, Seaford, Sussex County, Delaware ("the Site").

B. The State of Delaware (the "State") also filed a complaint against the defendants in this Court alleging that the defendants are liable to the State under Section 107 of CERCLA, 42 U.S.C. § 9607, and Section 105 of the Delaware Hazardous Substance Cleanup Act ("HSCA"), 7 Del. C. § 9105. The State in its complaint seeks reimbursement of response costs incurred for response actions taken under CERCLA and HSCA, at or in connection with the release or threatened release of hazardous substances at the Drum Burial Area of the Site.

C. Defendants Gardner Asphalt Corporation (DE) ("GAC"), Emulsion Products Company ("Emulsion") and Raymond T. Hyer, Jr. ("Hyer") (collectively "Settling Defendants") have entered into this Stipulation and Agreement ("Stipulation"). Settling Defendants do not admit any liability to Plaintiffs arising out of the transactions or occurrences alleged in the complaints.

D. The United States and Settling Defendants agree that this Stipulation has been negotiated by the Parties in good faith, that settlement of this matter will avoid prolonged and

assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Stipulation or in any appendix attached hereto, the following definitions shall apply:

- a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601 *et seq.*
- b. "Stipulation" shall mean this Stipulation and all appendices attached hereto. In the event of conflict between this Stipulation and any appendix, this Stipulation shall control.
- c. "Day" shall mean a calendar day. In computing any period of time under this Stipulation, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.
- d. "Declaration" shall mean a declaration made pursuant to 28 U.S.C. § 1746 and under penalty of perjury.
- e. "DOJ" shall mean the United States Department of Justice and any successor departments, agencies or instrumentalities of the United States.
- f. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of the United States.
- g. "EPA Hazardous Substance Superfund" shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.
- h. "Financial Information" shall mean those financial documents identified in Appendix B.
- i. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate

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#### **V. STATEMENT OF PURPOSE**

4. By entering into this Stipulation, the mutual objective of the Parties is for Settling Defendants to provide for payment to the United States in settlement of their alleged liability for the Site, as provided in the Covenant Not to Sue by the United States in Section VIII, and subject to the Reservations of Rights by the United States in Section IX.

#### **VI. PAYMENT OF SETTLEMENT CONSIDERATION**

5. Settling Defendants Emulsion and Hyer (the "Payors") shall pay to the EPA Hazardous Substance Superfund the principal sum of \$300,000.00, plus an additional sum for Interest as explained below. Payment shall be made in six timely installments. The first installment, in the amount of \$30,000.00, shall be timely if received by the United States on or before thirty (30) days following Court approval of this Stipulation, provided, however, that if Court approval of this Stipulation has not occurred prior to April 15, 2003, the Payors shall deposit \$30,000.00 into an interest bearing escrow or trust account, pending such approval, and such deposit shall be a condition of timely receipt of the first installment. Within ten (10) days of the Court's approval of this Stipulation, Payors shall pay the \$30,000.00 principal, plus any accumulated interest, to the United States. The second installment of \$30,000.00, plus accrued Interest, shall be timely if received by the United States on or before October 15, 2003. The remaining four installments of \$60,000.00 each, plus accrued Interest, shall be timely if received by the United States as follows:

- a. Third installment – if received on or before July 15, 2004;
- b. Fourth installment – if received on or before July 15, 2005;

## **VII. FAILURE TO COMPLY WITH STIPULATION**

9. Interest on Late Payments. If the Payors fail to make any payment under Paragraph 5 by the required due date and such nonpayment is not cured within 10 days following written notice to the Settling Defendants, all remaining installment payments and all accrued Interest (the "unpaid balance") shall become due immediately upon such failure. Interest shall continue to accrue on any unpaid amounts until the total amount due has been received.

10. Stipulated Penalties.

a. If the initial installment of \$30,000.00, due under Paragraph 5, is not paid by the required date, the Payors shall be in violation of this Stipulation and shall pay to the EPA Hazardous Substances Superfund, as a stipulated penalty, in addition to the Interest required by Paragraph 9, \$750.00 per violation per day that such payment is late.

b. Stipulated penalties are due and payable within 30 days of the date of the demand for payment of the penalties by EPA. All payments to EPA under this Paragraph shall be identified as "stipulated penalties" and shall be made by certified or cashier's check made payable to "EPA Hazardous Substance Superfund." The check, or a letter accompanying the check, shall reference the name and address of the party making payment, the Site name, the EPA Region and Site Spill ID Number A323, and DOJ Case Number 90-11-3-07224/1, and shall be sent to:

EPA Superfund  
P.O. Box 360515  
Pittsburgh, PA 15251-6515

13. Payments made under this Section shall be in addition to any other remedies or sanctions available to the United States against the Settling Defendants by virtue of the Payors' failure to comply with the requirements of this Stipulation.

14. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Stipulation. Payment of stipulated penalties shall not excuse the Payors from payment as required by Section VI.

#### **VIII. COVENANT NOT TO SUE BY PLAINTIFF**

15. Except as specifically provided in Section IX (Reservation of Rights by United States), the United States covenants not to sue or to take administrative action against Settling Defendants pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), with regard to the Site. With respect to present and future liability, this covenant shall take effect as to Emulsion and Hyer upon receipt by EPA of the first payment required by Section VI, Paragraph 5 (Payment of Settlement Consideration) and shall take effect as to GAC upon receipt of the final payment required under that Section and Paragraph. This covenant not to sue is conditioned upon the satisfactory performance by the Payors of their obligations under this Stipulation, including any conditional payment obligations, including but not limited to payment of all amounts due under Section VI (Payment of Settlement Consideration), and any amount due under Section VII (Failure to Comply with Stipulation). The extent of this covenant not to sue is also conditioned upon the veracity of the Financial Information provided to EPA by Settling Defendants. If the Financial Information is subsequently determined by EPA to be false or, in any material respect,

Covenant Not to Sue by United States in Paragraph 15. Notwithstanding any other provision of this Stipulation, the United States reserves all rights against Settling Defendants with respect to:

- a. liability for failure of Settling Defendants to meet a requirement of this Stipulation;
- b. criminal liability;
- c. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- d. liability, based upon Settling Defendants' ownership or operation of the Site, or upon Settling Defendants' transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal, of a hazardous substance or a solid waste at or in connection with the Site, after signature of this Stipulation by Settling Defendants; and
- e. liability arising from the past, present, or future disposal, release or threat of release of a hazardous substance, pollutant, or contaminant outside of the Site.

17. Notwithstanding any other provision of this Stipulation, EPA reserves, and this Stipulation is without prejudice to the right to reinstitute or reopen this action, or to commence a new action seeking relief other than as provided for in this Stipulation, if the Financial Information provided by Settling Defendants, or the financial certification made by Settling Defendants in Paragraph 27, is false or, in any material respect, inaccurate.

#### **X. COVENANT NOT TO SUE BY SETTLING DEFENDANTS**

18. Settling Defendants covenant not to sue and agree not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Site or



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Settling Defendants may have against any person if such person asserts a claim or cause of action relating to the Site against Settling Defendants.

#### **XI. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION**

21. Except as provided in Paragraph 20, nothing in this Stipulation shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Stipulation. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this Stipulation may have under applicable law. Except as provided in Paragraph 20, the Parties expressly reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which they may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

22. The Parties agree, and by approving this Stipulation the Court will find, that Settling Defendants are entitled, as of the date of approval of this Stipulation, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for "matters addressed" in this Stipulation. The "matters addressed" in this Stipulation are all response costs incurred or to be incurred, at or in connection with the Site, by the United States or any other person. The "matters addressed" in this Stipulation do not include those response costs or response actions as to which the United States has reserved its rights under this Stipulation (except for claims for failure to comply with this Stipulation), in the event that the United States asserts rights against Settling Defendants coming within the scope of such reservations.

person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary.

26. After the conclusion of the document retention period in the preceding paragraph, Settling Defendants shall notify EPA and DOJ at least 90 days prior to the destruction of any such records, and, upon request by EPA or DOJ, Settling Defendants shall deliver any such records to EPA. Settling Defendants may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendants asserts such a privilege, they shall provide Plaintiff with the following: 1) the title of the record; 2) the date of the record; 3) the name and title of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. However, no records created or generated pursuant to the requirements of this or any other settlement with the United States shall be withheld on the grounds that they are privileged. Any documents not requested by the United States within the 90-day notice period may be destroyed.

27. Settling Defendants hereby certify that, to the best of their knowledge and belief, after thorough inquiry, they have:

a. not altered, mutilated, discarded, destroyed or otherwise disposed of any records, reports, or other information, with the intent of not disclosing them to the United States or the State, relating to their potential liability regarding the Site since notification of potential liability by the United States or the State or the filing of suit against them regarding the Site, and that they have fully complied with any and all EPA requests for information regarding the Site

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As to EPA:

Natalie Katz, Esquire  
U.S. Environmental Protection Agency  
Region III  
1650 Arch Street  
Philadelphia, PA 19103

Barbara Borden  
Regional Financial Management Officer  
U.S. Environmental Protection Agency, Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029

As to Settling Defendants:

Catherine Peek McEwen, Esq.  
Attorney at Law  
2003 S. 50<sup>th</sup> Street, Suite B  
Tampa, FL 33619

or

P.O. Box 3355  
Tampa, FL 33601-3355

**XIV. RETENTION OF JURISDICTION**

29. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Stipulation.

**XV. INTEGRATION/APPENDICES**

30. This Stipulation and its appendices constitute the final, complete and exclusive Stipulation and understanding between the Parties with respect to the settlement embodied in this Stipulation. The Parties acknowledge that there are no representations, agreements or

## **XVII. SIGNATORIES/SERVICE**

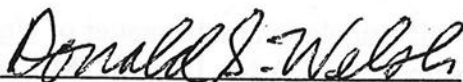
34. Each undersigned representative of Settling Defendants to this Stipulation and the Chief of the Environmental Enforcement Section of DOJ, certifies that he or she is authorized to enter into the terms and conditions of the Court's Order Approving this Stipulation and to execute and bind legally such Party to this document.

35. Settling Defendants hereby agree not to oppose entry of this Stipulation by the Court or to challenge any provision of this Stipulation, unless the United States has notified Settling Defendants in writing that it no longer supports entry of the Stipulation.

36. Settling Defendants shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on its behalf with respect to all matters arising under or relating to this Stipulation. Settling Defendants hereby agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to, service of a summons.

## **XVIII. FINAL AGREEMENT**

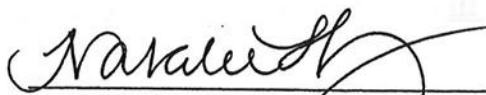
37. Upon approval of this Stipulation by the Court, this Stipulation shall constitute the final judgment agreement between the United States and Settling Defendants. The form of the order the Parties shall submit for entry by the Court is attached hereto as Appendix C.



DONALD S. WELSH  
Regional Administrator, Region III  
U.S. Environmental Protection Agency  
1650 Arch Street  
Philadelphia, PA 19103



WILLIAM C. EARLY  
Regional Counsel, Region III  
U.S. Environmental Protection Agency  
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NATALIE L. KATZ  
Assistant Regional Counsel  
U.S. Environmental Protection Agency  
1650 Arch Street  
Philadelphia, PA 19103

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FOR DEFENDANT RAYMOND T. HYER, JR.

Date: 4/14/03

Raymond T. Hyer, Jr.  
By: RAYMOND T. HYER, Jr.

P.O. Box 5449

Tampa, FL 33675

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name: Stephen J. Szabo

Title: Attorney

Address: 100 N. Tampa Street, Suite 2700, Tampa, FL 33602

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RAYMOND T. HYER, JR., )

Defendants. )

Civil Action No. 01-660 GMS

LIST OF FINANCIAL DOCUMENTS SUPPORTING STIPULATION  
AND AGREEMENT BETWEEN THE UNITED STATES OF AMERICA  
AND GARDNER ASPHALT CORPORATION, EMULSION  
PRODUCTS COMPANY, AND RAYMOND T. HYER, JR.

1. Affidavit of Robert P. Hickey
2. Affidavit of Raymond T. Hyer, Jr.
3. Affidavit of Sean W. Poole
4. State of Delaware Form UCC-1 for Gardner Industries, Incorporated
5. State of Delaware Form UCC-1 for Gardner Asphalt Corporation
6. State of Delaware Form UCC-1 for Gardner Industries, Incorporated and 10 affiliated corporations
7. State of Florida Form UCC-1 for Gardner Asphalt Corporation
8. State of Florida Form UCC-1 for GAC Kearny, Inc.



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and the entry of a consent judgment in the event of a default as provided in the Stipulation. It is further

ORDERED that until the earlier of such time as the United States' covenant not to sue takes effect as to all of the Defendants or the entry of a consent judgment as provided in the Stipulation, this matter shall be held in suspense as to the United States' complaint and the Settling Defendants' responsive pleading(s). It is further

ORDERED that the Settling Defendants are entitled, as provided in the Stipulation, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for "matters addressed" as defined in the Stipulation.

SO ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 2003.

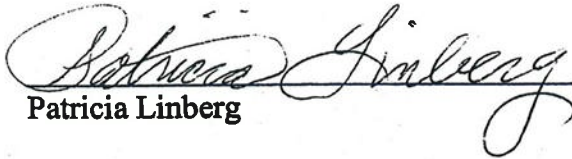
\_\_\_\_\_  
United States District Judge



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Patricia Linberg